

115TH CONGRESS  
1ST SESSION

# H. R. 4130

To amend title 9, United States Code, with respect to arbitration.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 25, 2017

Mr. O'ROURKE introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend title 9, United States Code, with respect to  
arbitration.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Mandatory Arbitration  
5       Transparency Act of 2017”.

1   **SEC. 2. VALIDITY AND ENFORCEABILITY OF PREDISPUTE**  
2                   **ARBITRATION AGREEMENTS CONTAINING**  
3                   **CONFIDENTIALITY CLAUSES.**

4       (a) IN GENERAL.—Title 9, United States Code, is  
5 amended by adding at the end the following:

6   **“CHAPTER 4—PREDISPUTE ARBITRATION**  
7                   **AGREEMENTS CONTAINING CON-**  
8                   **FIDENTIALITY CLAUSES**

“401. Definitions.

“402. Validity and enforceability.

9   **“§ 401. Definitions**

10      “(a) In this chapter—

11           “(1) the term ‘civil rights dispute’ means a dis-  
12          pute—

13           “(A) arising under—

14               “(i) the Constitution of the United  
15          States or the constitution of a State; or

16               “(ii) a Federal or State statute that  
17          prohibits discrimination on the basis of  
18          race, sex, disability, religion, national ori-  
19          gin, or any invidious basis in education,  
20          employment, credit, housing, public accom-  
21          modations and facilities, voting, or any  
22          program funded or conducted by the Fed-  
23          eral Government or a State government,  
24          including any statute enforced by the Civil

1                   Rights Division of the Department of Jus-  
2                   tice and any statute enumerated in section  
3                   62(e) of the Internal Revenue Code of  
4                   1986 (relating to unlawful discrimination);  
5                   and

6                   “(B) in which at least 1 party alleging a  
7                   violation of the Constitution of the United  
8                   States, a State constitution, or a statute pro-  
9                   hibiting discrimination is an individual;

10                  “(2) the term ‘consumer dispute’ means a dis-  
11                  pute between an individual who seeks or acquires  
12                  real or personal property, services, securities or  
13                  other investments, money, or credit for personal,  
14                  family, or household purposes and the seller or pro-  
15                  vider of such property, services, securities or other  
16                  investments, money, or credit;

17                  “(3) the term ‘covered confidentiality clause’  
18                  means a provision of a predispute arbitration agree-  
19                  ment that, with respect to an employment dispute,  
20                  consumer dispute, or civil rights dispute, purports  
21                  to, or could be interpreted by a reasonable person to,  
22                  prohibit a party to the dispute from—

23                  “(A) making a communication in a manner  
24                  such that the prohibition would violate a State  
25                  or Federal whistleblower statute; or

1               “(B) reporting or making a communica-  
2               tion, including to any relevant public official,  
3               elected official, or other State or Federal au-  
4               thority, about—

5               “(i) tortious conduct;  
6               “(ii) otherwise unlawful conduct; or  
7               “(iii) issues of public policy or public  
8               concern;

9               “(4) the term ‘employment dispute’ means a  
10          dispute between an employer and employee arising  
11          out of the relationship of employer and employee as  
12          defined in section 3 of the Fair Labor Standards  
13          Act of 1938 (29 U.S.C. 203); and

14               “(5) the term ‘predispute arbitration agree-  
15          ment’ means any agreement to arbitrate a dispute  
16          that had not yet arisen at the time of the making  
17          of the agreement.

18 **“§ 402. Validity and enforceability”**

19               “(a) IN GENERAL.—

20               “(1) PROHIBITION ON PREDISPUTE ARBITRA-  
21          TION AGREEMENTS WITH CONFIDENTIALITY  
22          CLAUSES.—Notwithstanding any other provision of  
23          this title, no predispute arbitration agreement shall  
24          be valid or enforceable if the agreement contains a  
25          covered confidentiality clause.

1           “(2) EXCEPTION.—Paragraph (1) shall not  
2       apply to a predispute arbitration agreement if a  
3       party to the agreement can demonstrate a confiden-  
4       tiality interest that significantly outweighs the pri-  
5       vate and public interest in disclosure.

6       “(b) APPLICABILITY.—

7           “(1) IN GENERAL.—An issue as to whether this  
8       chapter applies to an arbitration agreement shall be  
9       determined under Federal law. The applicability of  
10      this chapter to an agreement to arbitrate and the  
11      validity and enforceability of an agreement to which  
12      this chapter applies shall be determined by a court,  
13      rather than an arbitrator, irrespective of whether the  
14      party resisting arbitration challenges the arbitration  
15      agreement specifically or in conjunction with other  
16      terms of the contract containing such agreement.

17           “(2) COLLECTIVE BARGAINING AGREEMENTS.—  
18      Nothing in this chapter shall apply to any arbitra-  
19      tion provision in a contract between an employer and  
20      a labor organization or between labor organizations,  
21      except that no such arbitration provision shall have  
22      the effect of waiving the right of an employee to  
23      seek judicial enforcement of a right arising under a  
24      provision of the Constitution of the United States, a

1       State constitution, or a Federal or State statute, or  
2       public policy arising therefrom.”.

3           (b) TECHNICAL AND CONFORMING AMENDMENT.—

4       The table of chapters for title 9, United States Code, is  
5       amended by adding at the end the following:

“4. **Predispute arbitration agreements containing confidentiality clauses .....** 401”.

6 **SEC. 3. UNFAIR OR DECEPTIVE ACT OR PRACTICE.**

7       (a) DEFINITION.—In this section—

8           (1) the term “Commission” means the Federal  
9       Trade Commission; and

10          (2) the terms “covered confidentiality clause”  
11       and “predispute arbitration agreement” have the  
12       meanings given those terms in section 401 of title 9,  
13       United States Code, as added by section 2.

14       (b) PROHIBITION.—

15          (1) IN GENERAL.—It shall be unlawful for a  
16       person to knowingly offer to another person for rati-  
17       fication a predispute arbitration agreement that con-  
18       tains a covered confidentiality clause.

19          (2) EXCEPTIONS.—

20           (A) CONFIDENTIALITY INTEREST.—Para-  
21       graph (1) shall not apply to a person that offers  
22       a predispute arbitration agreement with a cov-  
23       ered confidentiality clause if the person can  
24       demonstrate a confidentiality interest that sig-

1 nificantly outweighs the private and public in-  
2 terest in disclosure.

3 (B) COLLECTIVE BARGAINING AGREEMENTS.—Paragraph (1) shall not apply with re-  
4 spect to any arbitration provision in a contract  
5 between an employer and a labor organization  
6 or between labor organizations, if the arbitra-  
7 tion provision does not waive the right of an  
8 employee to seek judicial enforcement of a right  
9 arising under a provision of the Constitution of  
10 the United States, a State constitution, or a  
11 Federal or State statute, or public policy aris-  
12 ing therefrom.

14 (c) ENFORCEMENT BY FEDERAL TRADE COMMISSION.—

16 (1) TREATMENT AS UNFAIR OR DECEPTIVE ACT  
17 OR PRACTICE.—A violation of subsection (b) by a  
18 person with respect to which the Commission is em-  
19 powered under section 5(a)(2) of the Federal Trade  
20 Commission Act (15 U.S.C. 45(a)(2)) shall be treat-  
21 ed as a violation of a rule defining an unfair or de-  
22 ceptive act or practice prescribed under section  
23 18(a)(1)(B) of that Act (15 U.S.C. 57a(a)(1)(B)).

24 (2) POWERS OF COMMISSION.—

17 (d) CIVIL ACTION.—

18                             (1) PRIVATE RIGHT OF ACTION.—Any person  
19       aggrieved by a violation of subsection (b) may bring  
20       a civil action in an appropriate district court of the  
21       United States.

22                   (2) REMEDIES.—In an action under paragraph  
23                   (1), the court may award—

(A) actual damages, but not less than liquidated damages in an amount equal to \$1,000;

## 7 SEC. 4. EFFECTIVE DATE.

8       (a) IN GENERAL.—This Act, and the amendments  
9 made by this Act, shall take effect on the date of enact-  
10 ment of this Act.

11                   (b) APPLICABILITY.—

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